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No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER L. LOWE, *et al.*,
Petitioners,

v.

SECURITIES EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 95 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

Publications and other forms of expression analyzing the value and the advisability of purchasing specific products or services have become an important part of

our national discourse. The notion that a person may be barred from engaging in this discourse on the basis of a prior criminal record appears on its face to strike at the core of the protection of free speech afforded by the First Amendment. The court below has authorized a prior restraint on expression in the absence of any showing that might justify a prior restraint on free speech. That court has sought to justify its approval of the prior restraint here solely on the ground that the expression being suppressed is entitled to a lesser degree of First Amendment protection. Neither of the theories offered by the lower court to sustain that conclusion can bear analysis.

1a. Petitioners' newsletters have none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction.'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). And, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech.

b. Aside from the "commercial speech" just discussed, this Court has never described a category of speech of a "commercial or economic nature" that is less deserving of First Amendment protection than other speech, and this Court's precedents leave no room for any such category. This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the

degree of First Amendment protection afforded to his speech. Similarly, the Court has made clear that speech relating to financial or economic matters is an important part of our national discourse, and deserving of full First Amendment protection.

2. The lower court's assertion that the First Amendment does not prohibit the regulation of speech as part of the regulation of economic activity is based upon cases that stand for a much narrower proposition: "[T]he constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as an *integral part of conduct* in violation of a valid . . . statute." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (emphasis added). When a First Amendment question is raised, the fact that the justification for restricting speech is an otherwise valid economic regulation is the beginning, not the end, of analysis. Were it otherwise, the state by its definition of illegal conduct could remove nearly any form of speech from the protection of the Constitution.

The wrong asserted here by the SEC, and the court below, is that by publishing these newsletters petitioner Lowe is practicing the profession of investment adviser without a license. We do not doubt that the legislature may establish requirements for those who wish to practice much of what is done by investment advisers. But it does not follow that the legislature may precondition the right to publish, in the general marketplace of ideas, facts and opinions concerning the relative merit of specific investments. If such expression is protected by the First Amendment, that expression does not lose that protection simply because the legislature defines publication of investment newsletters as part of the practice of an investment adviser and thereby claims the right to license the expression.

The question thus becomes whether, consistent with the First Amendment, the government may require a

license as a prerequisite to the opportunity to publish an investment newsletter. And, the answer to that question could not be more clear. As the Court in *Lovell v. Griffin*, 303 U.S. 444, 451, concluded, "it strikes at the very foundation of the freedom of the press [to] subject[] it to license and censorship." The SEC's asserted power to license, and therefore to prohibit, petitioners' publication of their newsletter violates the First Amendment.

ARGUMENT

Petitioners in this case publish newsletters. These newsletters are circulated to an average of over 5,000 subscribers, and at times up to 19,000 subscribers. One of the newsletters

> offers advice on the relative desirability of investing in, among other things, stocks, Treasury bills, and money market funds, and describes generally the state of the market. It recommends particular stocks and groups of stocks for purchase or sale, discusses precious metals . . . . [Pet. App. at A5-A6].

The other newsletter "is typically somewhat more specific . . . with a brief introductory examination of general market trends followed by specific purchase, sale, and hold recommendations particularly for low-priced stocks." Pet. App. at A6. "No contention is made that any of the information published in [these newsletters] has been false or materially misleading." Pet. App. at A6. "Nor is it alleged" that petitioners have "profited through personal or corporate investments from the investment advice" published in the newsletter. Pet. App. at A6.

The Securities and Exchange Commission ("SEC") claims the power, under the Investment Advisers Act of 1940, to bar petitioners from publishing these newsletters. This claimed power derives solely from the

SEC's revocation of petitioner Lowe's registration as an investment adviser on the ground that Lowe had been convicted of crimes "'reflect[ing] a callous disregard' for the high fiduciary standards required of an investment adviser . . . [and] 'demonstrat[ing] his total lack of fitness to remain in "an occupation which can cause harm unless engaged in by those with appropriate background standards."'" Pet. App. at A4.

The court below upheld the SEC's claim against a First Amendment challenge by petitioners and held that petitioners' newsletters may not include "advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or holding specific securities." Pet. App. at A20. But the court qualified that holding in the following respects:

> [W]e note what this holding does not entail. Lowe is not prohibited from publishing or stating his views as to any matter of current interest, economic, or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely. He is not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer. [Pet. App. at A20].

Publications and other forms of expression analyzing the value of specific products or services and the advisability of purchasing those products or services have become an important part of our national discourse. Only recently, this Court had occasion to note that the magazine *Consumer Reports*, which is exclusively devoted to such analysis, "plainly would qualify . . . as

a 'media' defendant . . . under any conceivable definition of that term." *Bose Corp. v. Consumers Union*, —— U.S. ——, 104 S.Ct. 1949, 1955 n.8. Such publications are often limited to evaluating specific products and services in a particular market. Indeed, the various sectors of the investment market are subject to such analysis by a multiplicity of publications including financial or stock market columns in daily newspapers, business oriented newspapers or magazines such as *Barron's*, *Forbes*, *The Wall Street Journal*, television and radio programs such as *Wall Street Week*, and countless newsletters like petitioners' which may be differentiated from some of the more well-known financial publications largely by the size of their circulation.[1]

The notion that a person may be barred from engaging in this discourse on the basis of a prior criminal record appears on its face to strike at the core of the protection of free speech afforded by the First Amendment. And, while the Investment Advisers Act would not by its terms include many of the publications just discussed within the definition of "investment adviser" (see note 1, *supra*), the constitutional analysis applied by the court below could not be limited to publications like those of petitioners. As this Court has stated, "the chief purpose of the [First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713. "Any prior restraint on expression comes to this Court with a 'heavy

[1] The Investment Advisers Act provides the following exclusion from the definition of "investment adviser": "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a)(11). It is far from clear what constitutes a "business or financial publication of general and regular circulation" and whether petitioners' newsletters are within or without that category. We do not address that question in this brief, but instead assume for purposes of our analysis that the Act requires publishers of newsletters like those before the Court to register as investment advisers.

presumption' against its constitutional validity." *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419; see also *New York Times Co. v. United States*, 403 U.S. 713, 714; *Minneapolis Star & Tribune v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 583-584 n.6. Yet the court of appeals authorized a prior restraint on expression in the absence of any showing that might justify a prior restraint on free speech. See *Near*, 283 U.S. at 716.

The court below sought to justify its approval of the prior restraint here not on the ground that the expression being suppressed poses the kind of danger necessary to validate a prior restraint where fully protected expression may be involved; rather, that court sought to justify its holding on the ground that the expression being suppressed is entitled to a lesser degree of First Amendment protection.[2] The court below offered two alternative theories to sustain that conclusion: first, that the expression at issue is "commercial speech" and thus is not entitled to full First Amendment protection; second, that this case "involv[es] the permissible regulation of economic activity" (Pet. App. at A17)—specifically, "the regulation of a profession" (Pet. App. at A18)—and thus the expression here is outside the bounds of normal First Amendment mandates.

[2] Even if the court below were correct in this conclusion, and we devote the rest of this brief to showing it is not correct, it would not follow that an absolute bar would be permissible. In the regulation of obscenity, a form of expression which this Court has repeatedly held to be outside the protection of the First Amendment, this Court has required the most rigorous procedural safeguards before permitting prior restraint, because of the danger that protected speech might be caught up in the regulation. "[T]he freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66.

To a large degree, these theories implicate points that are also germane to the second question posed by this Court in the rehearing order in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18: "Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?" 52 LW 3937 (July 5, 1984). The AFL-CIO submitted an *amicus curiae* brief in *Dun & Bradstreet* that addresses these common points. We attach the pertinent pages from that brief as an appendix to the instant brief, and in part 1, *infra*, we briefly summarize the arguments made in those pages. In part 2, *infra*, we address the particular reasoning employed by the lower court here to support the second of the two theories described above.

1a. Petitioners' newsletters provide to subscribers information, analysis, and opinions respecting a variety of business entities. This material, as stated earlier, is akin to the substance of financial reports printed in major newspapers and magazines. Such expression has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). Every case in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction. And, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other pro-

posals for a commercial transaction, and not other kinds of speech:

> [C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.* [*Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 n.6].

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance his sales of that product and the attendant profits.

b. Aside from the "commercial speech" just discussed, this Court has never described a category of speech of a "commercial or economic nature" that is less deserving of First Amendment protection than other speech, and this Court's precedents leave no room for any such category.

Petitioners newsletters may be said to be economic in nature in two respects. The newsletters are prepared and published for sale at a profit, and thus for petitioner's ultimate economic benefit. And, the subject matter of the newsletters is fact and opinion concerning the relative merit of various investment alternatives. This Court's decisions affirm that neither of these factors is a basis for affording the newsletters diminished First Amendment protection. Thus, this Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection

afforded to his speech. *New York Times v. Sullivan*, 376 U.S. 254, 266. See also, *e.g.*, *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530; *First National Bank v. Bellotti*, 435 U.S. 765; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. Similarly, the Court has made clear that speech relating to financial or economic matters is an important part of our national discourse, and deserving of full First Amendment protection. See, *e.g.*, *Thornhill*, 310 U.S. at 102-103; *Thomas*, 323 U.S. at 531-532.

Here, for example, facts and opinions concerning the relative worth of alternative investments help to determine the allocation of capital in our economy, which allocation is at the core of our economic system. The direction of our economy is a function of the combined effect of a multitude of individual investment decisions made by private citizens. It is critical that those decisions be informed by the free flow of information the First Amendment is intended to protect.

For a fuller discussion of these points, see the appendix hereto.

2. The second of the two alternative theories by which the court below upheld the prohibition on petitioners' speech is that the prohibition was pursuant to a valid economic regulation, the regulation or licensing of a profession, and is therefore not violative of the First Amendment. The lower court's assertion that the First Amendment does not prohibit the regulation of speech as part of the regulation of economic activity is based upon cases that stand for a much narrower proposition: "[T]he constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as a *integral part of conduct* in violation of a valid . . . statute." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (emphasis added). Thus, if a bank robber accomplishes his wrong by passing a written note to a bank teller requesting that he be provided with the

bank's money, it does not violate the First Amendment either to prosecute the robber for his crime or to rely on the written note in the course of that prosecution. The cases relied upon by the court below are exclusively in this vein.[8]

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[8] The lower court (Pet. App. at A15) relied on a portion of the following passage from *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456:

> Moreover, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1969), *cert. denied*, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.

As the passage's quote from *Giboney* reveals, the cited cases were meant as examples of the general proposition illustrated by the bank robbery hypothetical described in text. *Giboney* involved coercive picketing that was intended to force an unlawful work stoppage which in turn was intended to force a wholesale distributor to discontinue doing business with non-union retailers, an objective that was unlawful under the state anti-trade restraint law. In *Texas Gulf Sulphur*, the "exchange of information about securities" was part of a transaction violative of the prohibitions against insider trading. In *Mills*, the "corporate proxy statements" were part of a scheme to mislead shareholders in violation of the Securities Exchange Act of 1934. In *American Column & Lumber Co.*, the "exchange of price and production information among competitors" was an integral part of a conspiracy in restraint of trade in viola-

That there are situations in which this rule should apply cannot be gainsaid. But it is equally true that if the rule is not appropriately confined, but rather is stretched to permit any government restriction of speech that is part of an otherwise valid economic regulation, the potential for governmental restriction of speech would be virtually limitless. Thus, when a First Amendment question is raised, the fact that the justification for restricting speech is an otherwise valid economic regulation is the *beginning*, not the end, of analysis. Were it otherwise, the state by its definition of illegal conduct could remove nearly any form of speech from the protection of the Constitution. As this Court stated in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844:

> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press

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tion of the Sherman Act. And, in *NLRB v. Gissel Packing Co.*, the "employer's threats of retaliation for the labor activities of employees" were part and parcel of an unlawful effort to coerce employees in their decision whether to join a union. See *Thomas v. Collins*, 323 U.S. 516, 537-38 ("When to [the employer's] persuasion other things are added which bring about coercion, or give it that character, the limit of the [First Amendment] right has been passed.")

In addition to the passage quoted from *Ohralik*, the lower court also cited (Pet. App. at A17-A18 n.6) the following cases: *Virginia State Board of Pharmacy, supra* (a commercial speech case); *Ohralik, supra* (a commercial speech case); *Young v. American Mini Theatres*, 427 U.S. 50, 62-63, n.18 (zoning requirements for "adult" theaters are "[r]easonable regulations of the time, place, and manner of protected speech"); *NLRB v. Retail Store Employees*, 447 U.S. 607, 616 (picketing in furtherance of an unlawful secondary boycott under the National Labor Relations Act).

> would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Here, for example, the government has defined the publication of newsletters by petitioners as a wrong. In this instance, the wrong has nothing to do with any alleged harm worked by those newsletters themselves. The *only* wrong is that in the view of the SEC, and the court below, by publishing these newsletters petitioner Lowe is practicing the profession of investment adviser after his license has been revoked. Indeed, others could publish the very same material without committing any wrong. Petitioner Lowe himself could publish the same material if he could publish or gain employment with a "bona fide" newspaper.

We do not doubt that the legislature may establish requirements for those who wish to practice much of what is done by investment advisers. To the extent that such advisers may in effect place themselves in a direct fiduciary relationship with their individual clients the reasons for requiring certain minimum standards are much the same as apply in other professions. *Cf., Ohralik*, 436 U.S. at 457.

But it does not follow that the legislature may precondition the right to publish, in the general marketplace of ideas, facts and opinions concerning the relative merit of specific investments. *If such expression is protected by the First Amendment, that expression does not lose that protection simply because the legislature defines publication of investment newsletters as part of the practice of an investment adviser and thereby claims the right to license the expression.*

The question thus becomes whether, consistent with the First Amendment, the government may require a license as a prerequisite to the opportunity to publish an investment newsletter. And, the answer to that question could not be more clear. The initial impetus for

what we now know as freedom of the press came in Seventeenth Century England in the struggle against licensing of the press. In *Lovell v. Griffin*, 303 U.S. 444, 451 (footnote omitted), this Court alluded to that history:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.

See also *Near v. Minnesota*, 283 U.S. at 713-714; *Grosjean v. American Press Co.*, 297 U.S. 245-246. As the Court in *Lovell* concluded, "it strikes at the very foundation of the freedom of the press [to] subject[] it to license and censorship." 303 U.S. at 451.

If a legislature sought by licensing to assure the qualifications of those who publish materials on the subjects of defense or foreign policy—subjects as to which accurate reporting is of critical importance to our society—no one would take seriously the contention that such regulation is constitutional as merely the licensing of professionals.

Nor, we submit, would the result be different if an attempt were made to require licensing of all reporters and commentators, including those who serve on daily newspapers or large magazines, who publish advice as to the merit of specific investment alternatives.

By the same token, the assertion here that the legislature may require licensing of those who publish newsletters of the type published by petitioners cannot be squared with the protections of the First Amendment.

"In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-785. The SEC's asserted power to license, and therefore to prohibit, petitioners' publication of their newsletters therefore violates the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit in this case should be reversed.

Respectfully submitted,

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APPENDIX

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GREENMOSS BUILDERS, INC.,
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On Writ of Certiorari to the Supreme Court of the State of Vermont

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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(2) The second question posed by the Court is whether the *Gertz* rule against presumed and punitive damages should apply "when the speech is of a commercial or economic nature." Order of July 5, 1984, —— U.S. ——, 52 L.W. 3937. It is our submission that the speech here is not "commercial speech" as this Court has defined that term and that, aside from "commercial speech," there should be no category of "speech of a commercial or economic nature" entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to the substance of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society that the First Amendment is intended to protect.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385).

In *Chrestensen* the Court held "that the Constitution imposes no . . . restraint [based on a right of free speech] on government as respects purely commercial advertising." 316 U.S. at 54. *Virginia Pharmacy* revisited

that ruling and held that commercial advertising—a phrase the Court used interchangeably with the term "commercial speech" (e.g. 425 U.S. at 772 n.24)—is entitled to First Amendment protection, albeit to a lesser degree of protection than is afforded to other forms of speech. While *Virginia Pharmacy*, in other words, did alter the rule of constitutional law governing the "commercial speech" category, that case did not alter the scope of the category in a way that narrows the speech entitled to the full degree of First Amendment protection.

Every case since *Virginia Pharmacy* in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction.[7] And, the Court has continued to use the terms "commercial speech" and "purely commercial advertising" as synonymous[8] and

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[7] *Bolger v. Young Drug Products Corp.*, —— U.S. ——, 103 S.Ct. 2875 (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (advertising legal services); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (advertising houses). See also, the pre-*Virginia Pharmacy* cases discussing the doctrine of commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (adversing abortions); *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (advertising jobs).

[8] *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Bates v. State Bar of Arizona*, 433 U.S. at 364 ("Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services . . . .").

has repeatedly defined the concept of "commercial speech" as "speech proposing a commercial transaction."[9] Moreover, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech. The Court in *Central Hudson*, 447 U.S. at 564 n.6, succinctly summarized that rationale:

> In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co. v. Public Service Comm'n*, [447 U.S. 530,] 537-540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance sales of that product and the attendant profits.

A comparison of *Central Hudson* and its companion case *Consolidated Edison Co.* (cited in the above-quoted passage), helps to put the foregoing in concrete terms. *Central Hudson* concerned advertising by an electric utility to "promote the use of electricity" (447 U.S. at 558), the utility's product. Those advertisements were deemed by the Court to be "commercial speech," and

[9] See, *e.g.*, *Bolger*, 103 S.Ct. at 2880; *Metromedia*, 453 U.S. at 505-506; *Central Hudson*, 447 U.S. at 562; *Friedman*, 440 U.S. at 11.

analyzed accordingly. *Consolidated Edison*, concerned materials circulated by an electric utility to extol the "benefits of nuclear power" (447 U.S. at 532), a matter of the most direct economic interest to the utility. But even though Consolidated Edison's ultimate objective was to enhance its profit making opportunities, the Court did *not* treat its materials as commercial speech but rather as speech entitled to full First Amendment protection. The Court explained that the speech in *Consolidated Edison* was "a direct[] comment on a public issue" while that in *Central Hudson* was "advertising 'clearly intended to promote sales' " and therefore speech "in the context of [a] commercial transaction[]." 447 U.S. at 563 n.5.[10] And the Court added "the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.' " *Id.* quoting *Ohralik*, 436 U.S. at 456.

D&B's reports at issue here are not purely commercial advertisements for some underlying good or service or a proposal to buy or sell such a product. And, D&B, like any other reporter or commentator on financial matters, was commenting not on its own internal operations but on those of a third person as to whom D&B had no inherent knowledge. Moreover, like most reporters and commentators, D&B was activated by its desire to sell its publication not by the advertiser's desire to capitalize on its production of an underlying good or service. Thus, D&B's speech is not "commercial speech."

(b) As noted at the outset, the second question posed by the Court inquires about the relevance to proper application of the *Gertz* test of the fact that speech is "commercial or economic in nature." Aside from the "commercial speech" just discussed this Court has never

[10] See also, *Friedman*, 440 U.S. at 11 and n.10; *Bolger*, 103 S.Ct. at 2880-2881.

described a category of speech "of a commercial or economic nature" less deserving of First Amendment protection than other speech, and we submit that this Court's precedents leave no room for any such category.

D&B's reports are commercial and economic in nature in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and in that the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection.

This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection afforded to his speech. Thus, in *New York Times v. Sullivan*, 376 U.S. at 266, the Court in affording full protection to that newspaper stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." See also, *e.g.*, *Consolidated Edison*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. It therefore suffices to say that if the fact that D&B's reports are sold for profit makes those reports "economic speech" subject to a lesser degree of First Amendment protection, then *The New York Times* and *The Wall Street Journal* in their entirety would also be economic speech subject to such lesser protection.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are "commercial or economic in nature"—cannot be a basis for diminished First Amendment protection. To so conclude, would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than the balance of those newspapers. The same adverse consequence would

be visited on publications like *Consumers Reports*, which evaluate commercial products. But speech relating to financial or economic matters, private as well as public, is an important part of our national discourse. In a free enterprise economy such matters as the financial standing of a company or the quality of its products are of great public interest. This Court has never suggested, or countenanced, a view of the First Amendment that would afford less protection to speech on such subjects. To the contrary, in *Thornhill v. Alabama*, 310 U.S. at 102-103, the Court stated:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 155, 162-63. See *Senn v. Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

See also *Thomas v. Collins*, 323 U.S. at 531-532.

What the Court said in the labor relations context applies equally to all other aspects of our commercial system. For example, the reporting of facts indicating the impending collapse of a bank or disclosing that a particular corporation has suffered large losses or has filed a petition in bankruptcy are as important to the course of our society as the range of reporting on private individuals assuredly protected by the *Gertz* rule. There is, accordingly, no warrant for extending a lesser degree of protection to speech on commercial or economic subjects than to speech on other subjects.